

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ARTHUR B. CHERRY,

Defendant-Appellant.

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UNPUBLISHED

May 11, 2004

No. 246792

Wayne Circuit Court

LC No. 02-005335

Before: Fitzgerald, P.J., and Jansen and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree felony murder,<sup>1</sup> MCL 750.316, assault with intent to rob while armed, MCL 750.89, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to concurrent terms of life imprisonment, 285 to 600 months, and to a two year consecutive term for felony-firearm. We affirm.

Defendant first argues that the verdict was against the great weight of the evidence. We disagree. A motion for a new trial is reviewed for an abuse of discretion. *People v Abraham*, 256 Mich App 265, 269; 662 NW2d 836 (2003). A verdict is against the great weight of the evidence if the evidence preponderates “heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand.” *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998).

A verdict may only be vacated when it “does not find reasonable support in the evidence, but is more likely to be attributed to causes outside the record such as passion, prejudice, sympathy, or some extraneous influence.” *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993), citation omitted. Questions regarding the credibility of witnesses and conflicting testimony do not constitute sufficient grounds for granting a new trial. *Lemmon*, *supra*, 456 Mich 643. When there is conflicting evidence, the question of credibility ordinarily should be left for the factfinder. *Id.*

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<sup>1</sup> The underlying felony was first-degree home invasion, MCL 750.110a.

There are several very narrow exceptions where the trial court is permitted to make judgment on the credibility of a witness. *Lemmon, supra*, 456 Mich 643. These exceptions include:

when the testimony contradicts indisputable physical facts or laws, where the testimony is patently incredible or defies physical realities, where a witness's testimony is material and so inherently implausible that a reasonable juror could not believe it, or where the witness' testimony has been so seriously impeached and the case marked by uncertainties and discrepancies. [*Id.* at 643-644 (citations omitted).]

If one of the tests apply, the court must then determine whether there is "a real concern that an innocent person may have been convicted," or that "it would be a manifest injustice" to not reverse the guilty verdict. *Lemmon, supra*, 456 Mich 644, quoting *Untied States v Sanchez*, 969 F2d 1409, 1414 (CA 2, 1992).

Here, accomplice Hampton was the only witness to place defendant at the scene of the shooting. Hampton admitted to making several different statements after the incident occurred. Her first statements, given under a false name, indicated that she did not know the men who entered the house. Hampton stated that she did not tell the police that she knew who the men were because that would also implicate her in the crime. Hampton later gave police her actual name and told them that she, along with co-defendant Anthony Adams and defendant, was involved in the murder. Hampton stated that she had told defendant and Adams not to use a gun in the robbery, and that she was surprised when defendant came into the house holding a gun. When she protested about the gun, defendant told her repeatedly to "shut up."

Defendant claims that Hampton's testimony was not credible because she was repeatedly impeached. However, there was other evidence that bolstered Hampton's version of events. Decedent's son, who was in the basement of the home at the time of the robbery, heard a male voice say "shut up" a number of times. And, although he denied it at trial, there was evidence that Hunter told the police that defendant carried a gun, and that defendant and Adams were "always talking about a lick."

No exception applies in this case that would allow the court to consider the credibility of the witnesses. *Lemmon, supra*, 456 Mich 643. Where, as here, there is conflicting evidence, the question of credibility should be left for the factfinder. *Id.* at 642-643. The jury chose to believe Hampton's testimony that defendant was the perpetrator. We do not find Hampton's testimony so inherently implausible, or so seriously impeached and marked by uncertainty and discrepancies, that reasonable jurors could not believe it. The court did not abuse its discretion in finding that the verdict was not against the great weight of the evidence.

Defendant also argues that the trial court erred in denying his request for a *Ginther*<sup>2</sup> hearing. We disagree. A trial court's decision to hold an evidentiary hearing is reviewed for an abuse of discretion. *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999).

To establish a claim of ineffective assistance of counsel, the burden is on defendant to show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment and that the deficient performance prejudiced the defense as to deprive defendant of a fair trial. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). There is a strong presumption that counsel's conduct was reasonable. *Id.* This Court will not substitute its judgment for that of trial counsel regarding matters of trial strategy. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). Nor will we assess counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Decisions about calling and questioning witnesses are matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant now argues that trial counsel was ineffective because defendant had two witnesses who would testify on his behalf to defendant's whereabouts at the time of the crime, but that counsel failed to raise an alibi defense. During the motion hearing on this matter, the prosecutor reminded the trial court that defense counsel indicated during trial that he and defendant had decided, after consultation with defendant's family, not to present any further evidence. As the trial court subsequently noted in denying defendant's motion for a *Ginther* hearing, "[t]his defendant was a grown man. The decision of the defendant was an intelligent, thought out, reflected upon decision which the defendant even had the benefit [of] discussing with his family members." Defendant has not overcome the presumption that counsel's actions were reasonable or that any alleged defects detrimentally affected the result of the trial. *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998). The trial court did not abuse its discretion by denying defendant's motion for an evidentiary hearing. *Jones, supra*, 236 Mich App 404.

Affirmed.

/s/ E. Thomas Fitzgerald  
/s/ Kathleen Jansen  
/s/ Michael J. Talbot

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<sup>2</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).